FILED
MAY 9 1997
OFFICE OF THE CLERK

No. 96-1637

In The

Supreme Court of the United States

October Term, 1996

HOMER WOLFE,

Petitioner,

v.

DENISE DeBOSE, JOHN DeBOSE, and
BEAR VALLEY CHURCH OF CHRIST,
a Colorado Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Colorado

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

JAMES D. JOHNSON
Counsel of Record
HIBSCHWEILER & JOHNSON
Attorneys at Law
2696 South Colorado Blvd.
Suite 595
Denver, Colorado 80222
(303) 692-0900

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Argument

1. Response to DeBoses' Argument I, which argues that "The Colorado Supreme Court followed well-settled decisions of this court in holding that legal restriction of 'secular conduct' not proven to be rooted in religious belief does not burden the free exercise of religion" [title of DeBoses' Argument I.A.], and that the petitioners presented no evidence that their "tortious conduct was religiously motivated" [excerpt from title of DeBoses' Arguments I.B.1. and I.B.ii.] 1

2. Response to the DeBoses' Argument that the testimony of the plaintiffs' experts "did not address religious beliefs" [DeBoses' Argument II] 7

Conclusion 10

TABLE OF AUTHORITIES

Page

United States Circuit Court of Appeals Decisions:

Dausch v. Rykse, 52 F.3d 1425 (7th Cir. 1994) 10

U.S. District Court Decisions:

Barquin v. Roman Catholic Diocese, 839 F.Supp. 275 (D.Vt. 1993).....6, 10

Sanders v. Baucum, 929 F.Supp. 1028 (N.D.Tex. 1996) 10

Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991) 10

Colorado Supreme Court Decisions:

Bear Valley Church of Christ v. DeBose, ___ P.2d ___ (Colo. 1996), Colorado Supreme Court Case No. 95-SC-42, decided December 23, 1996 .....1, 9

Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) 2, 5

Moses v. Diocese of Colorado, 863 P.2d 310 (Colo. 1993), cert. den., 511 U.S. 1137, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994) 6

Other States' Appellate Decisions:

Amato v. Greenquist, ___ N.E.2d ___ (Ill.App. 1997), 1997 WL 182763 (decided 4/16/97) 10

Erickson v. Christenson, 99 Or.App. 104, 781 P.2d 383 (1989)..... 10

F.G. v. MacDonell, 291 N.J.Super. 262, 677 A.2d 258 (App.Div. 1996) 10

TABLE OF AUTHORITIES – Continued

Page

Jones v. Trane, 153 Misc.2d 822, 591 N.Y.2d 927 (1992) 10

Nally v. Grace Community Church of the Valley, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988), cert. den., 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989) 10

Schieffer v. Catholic Archdiocese of Omaha, 244 Neb. 715, 508 N.W.2d 9907 (1993) 6

Constitution of the United States:

First Amendment 2

OTHER AUTHORITIES

Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis, 19 Rutgers L.J. 419, 437 (1988) 5

Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept, 19 Cal.W.L.Rev. 507, 516 (1983) 6

Clergy Malpractice: Making Clergy Accountable to a Lower Power, 14 Pepperdine L.Rev. 137, 139 (1986) 6

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The DeBoses' Brief in Opposition makes two main arguments. Each will be addressed in turn.

1. **Response to DeBoses' Argument I, which argues that "The Colorado Supreme Court followed well-settled decisions of this court in holding that legal restriction of 'secular conduct' not proven to be rooted in religious belief does not burden the free exercise of religion" [title of DeBoses' Argument I.A.], and that the petitioners presented no evidence that their "tortious conduct was religiously motivated" [excerpt from title of DeBoses' Arguments I.B.1. and I.B.ii.].**

The DeBose respondents attempt to characterize these causes of action as "legal restriction of 'secular conduct' ", and argue by analogy to zoning, unemployment, draft-resistance, and similar types of cases, contending that there can be no invocation of Free Exercise protection unless there is evidence that the conduct in question is based on a sincerely held religious belief. The point which has become obscured in the decision of the Colorado Supreme Court in *Bear Valley Church of Christ v. DeBose*, and which the DeBose respondents remain intent on obscuring in their Brief in Opposition, is that the "religiously motivated activity" in which Mr. Wolfe was engaged was **pastoral counseling**. Pastoral counseling is by nature an ecclesiastical function. Mr. Wolfe[1] was a minister of God, and the activity complained of occurred during pastoral counseling sessions. It is the **context** of pastoral counseling which triggers Free Exercise Analysis. In spite of its holding in *this* case, even the Colorado Supreme Court previously declined to recognize a cause of action for "clergy malpractice," in part because such a cause of action "would

---

[1] In common parlance, Homer Wolfe would be referred to as Reverend Wolfe, but such titles are not favored in the Church of Christ. Therefore, he is referred to here as "Mr. Wolfe."

derogate the constitutionally protected interest of ministers, priests, and rabbis to conduct bona fide marriage counseling as guaranteed by the Free Exercise Clause of the First Amendment." *Destefano v. Grabrian*, 763 P.2d 275, 289 (Colo.1988) [Quinn, J., concurring]. However, the causes of action for breach of fiduciary duty and outrageous conduct have since been exploited to derogate exactly that "constitutionally protected interest."

It makes no sense to say that pastoral counseling is constitutionally protected in the abstract, but then to declare open season on the *methods* employed by a clergyman providing pastoral counseling. How is the free exercise of religion in pastoral counseling protected, if the state stands ready to impose liability on the clergyman for everything he says or does in counseling, unless he can offer up a specific scriptural or canonical mandate for his action? In fact, the inquisition as to whether a particular pastoral counseling technique is sufficiently "religious" must itself be viewed as an encroachment of government into the exclusive purview of religion.[2]

In the case now before the court, Homer Wolfe has consistently said that, if he had any physical contact with John DeBose, that was massage administered in the course of pastoral counseling, to further the goal of pastoral counseling. Mr. Wolfe expressly stated that his role as a pastoral counselor was to bring individuals closer to God: "That was my

---

[2] This is not to say that everything which transpires between a clergyman and a member of the congregation whom he is counseling falls within the Free Exercise Clause. In *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), Father Grabrian acknowledged that his sexual affair with Mrs. Destefano was not in furtherance of pastoral counseling, and thus had no religious motivation. Under those circumstances, no Free Exercise analysis was triggered.

Where a clergyman *does* assert that his actions in the course of pastoral counseling were religiously motivated, there may properly be a factual inquiry as to what his actions were, and factual determination by the jury as to where the assertion of religious motivation is sincere. However, within the framework of pastoral counseling, any assertion of religious motivation should at least trigger Free Exercise analysis.

entire basic goal, to get people back to God, in communication with him, living with him and for him; and all the counseling I did was designed to do that. And, of course, the only ways that God speaks – letting him be responsible, let him keep his promises, learning our – helping other people to learn how to open their hearts." [Vol. 13, 42:21-43:2.] Wolfe testified that he has never tried to provide secular counseling, that his counseling has always been religiously-oriented, and that he has never tried to engage in sexual conduct during pastoral counseling:

> "Q. Referring to the kind of counseling that you have done, Homer, are there different kinds of counseling?
>
> "A. Yes, there are.
>
> "Q. What are there, two basic types?
>
> "A. Two basic types, yes. One is generally speaking, secular counseling and the other is pastoral counseling.
>
> "Q. What is secular?
>
> "A. The word "secular" itself means the absence of God, without God; and so the secular counselor does not call upon God or pinpoint him or consult him at all. In fact, it is sort of like man pulling himself by his own bootstraps, finding the pulpit within himself and the direct contact. Jeremiah said, it is not in the way of man to get in the steps. In other words, we can't find our way in life without God. And in the pastoral counselor, where a pastor brings – the best picture is of a shepherd. It brings to mind the shepherd without whom the sheep – the sheep are helpless. They can't defend themselves. He gets them food or water. They must have someone to direct them. This is the shepherd. It's man not being able to direct his own steps, must have God's and Christ's help in finding his way out of his hurting way of life into a acceptable, happy way of life. So pastoral counseling depends upon Christ, not upon the counselor, and God.

"Q. Have you ever done any secular counseling?

"A. No, sir.

"Q. All of your counseling has been pastoral?

"A. Yes, very definitely.

"Q. Is that sometimes referred to as – also as biblical counseling?

"A. Yes, sir, it is.

"Q. And Christian counseling?

"A. Yes, sir, they're the same.

"Q. Over the years when you have been called on to counsel people in pastoral counseling, have you explained each time to the counselee what can be done by them – or them in order to obtain help?

"A. Yes, sir. I've always made it a point to point out basically the facts of pastoral counseling, telling them that actually I have no power to change your lives. I do not have the wisdom or the understanding of the Lord to change your lives, that – but that I could be a facilitator in order to help them get communication with God and find –

. . . .

"Q. (By Mr. Johnson) As I understand your last answer, then, you have always explained to any counselee that he must receive help from God, if at all, but that you will do your best to help?

"A. As your only source.

"Q. If a person came to you for counseling and said he was not willing to seek help from God, would you have offered counseling to him?

"A. No. I'd suggest that he seek – he or she seek secular counseling.

"Q. In all of your counseling activity, Homer, over the – by the way, about how many years were you a minister in the Church of Christ before you retired?

"A. Approximately 40.

"Q. And in all of those 40 years, were you called on with varying degrees of frequency to counsel with people when they came to you?

"A. Yes, sir. That is just normal expectancy of one in the ministry.

"Q. In all of your counseling in that 40-year period, did you ever have any sexual attraction to anyone that was in counseling with you?

"A. Absolutely not.

"Q. Did you ever have any sexual motives in anything you have ever done in counseling with anyone?

"A. No, sir.

"Q. Were you ever, whether in or out of counseling, ever sexually attracted to any man or boy?

"A. Not at all.

"Q. In all of your counseling, have you ever done anything that – other than what you considered to be in the best interests of the counselee?

"A. I've always been highly concerned about the welfare of my counselees. I have cared for them. I have been concerned about them and their needs and any activities."

[Vol. 13, 11:8-13:3, 13:25-15:10.]

It is obviously true that not all the problems Mr. Wolfe confronted involved scriptural interpretation, but pastoral counseling extends beyond that which is directly targeted at meeting spiritual needs. Again, in *Destefano v. Grabrian*, even the Colorado Supreme Court recognized this:

"[C]ounseling by members of the clergy is frequently directed to matters that are essentially secular in nature. 'Family counseling and psychological counseling are two notable areas in which there is substantial overlap between the secular and religious aspects of a spiritual counselor's activities.' Note, *Clergy Malpractice: Taking Spiritual Counseling Conflicts Beyond Intentional Tort Analysis*,

> 19 Rutgers L.J. 419, 437 (1988). But see Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 Cal.W.L.Rev. 507, 516 (1983) (pastoral counseling is a religious, not secular, activity in which '[i]t is impossible to separate the 'cure of the minds' from the 'cure of the souls'); Comment, *Clergy Malpractice; Making Clergy Accountable to a Lower Power*, 14 Pepperdine L.Rev. 137, 139 (1986) ('While some degree of overlap and similarity may exist, the religious counselor remains distinct and unique from his secular counterpart, approaching therapy from an entirely different perspective.')."

Id. at 285, fn. 10.

The DeBoses have disputed whether Wolfe's conduct during pastoral counseling sessions was religiously motivated, and counsel for this petitioner acknowledges that there was a jury question, although *not* as to the correctness of Mr. Wolfe's professed methods, but as to the *sincerity* of his contention as to his motivation. The jury needed to be instructed that, if it believed Mr. Wolfe, he was protected by the Free Exercise Clause.[3]

---

[3] Even if there were no Free Exercise Clause issue presented, there would clearly be an Establishment Clause issue. Whether or not the conduct is religiously motivated, the imposition of this type of civil liability amounts to government regulation of the overall activity of pastoral counseling, in contravention of the Establishment Clause. *Barquin v. Roman Catholic Diocese*, 839 F.Supp. 275 (D.Vt. 1993). See, also, *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993). The Colorado Supreme Court denied certiorari on the Establishment Clause issue, and thus left standing its earlier holding in *Moses v. Diocese*, which the Court of Appeals treated as controlling. 890 P.2d at 221. The DeBoses have made no response to the Establishment Clause argument.

2. Response to the Deboses' Argument that the testimony of the plaintiffs' experts "did not address religious beliefs" [Deboses' Argument II].

This part of the DeBoses' brief is apparently intended to support either a contention that these causes of action do not infringe on the free exercise of religion, because they supposedly do not require that a standard of care be set for pastoral counseling, or to support a contention that these causes of action do not involve any "establishment" of religion, because they supposedly do not require that a standard of care be set for pastoral counseling. If it were true that no expert testimony was received as to what conduct is acceptable in pastoral counseling, these causes of action would be no less disturbing, for the reasons set forth in Wolfe's Petition. However, the fact is that the jury heard reams of expert testimony intended to set boundaries for permissible pastoral counseling.

The plaintiff brought four experts to testify: Marie Fortune, who is a clergyperson, as an expert in Theology; Dr. Kathy Morall, as an expert in psychiatry; Mr. Randy Sims, as an expert in psychotherapy; and Mr. Gary Schoener, as an expert in psychology. Each of these witnesses was asked to provide expert opinions as to the standard of care ostensibly governing pastoral counselors, and as to Homer Wolfe's breach of that standard.

Marie Fortune is a clergyperson with the United Church of Christ (a denomination unrelated to the Church of Christ, in spite of the similarity of the names), and executive director of the Center for the Prevention of Sexual and Domestic Violence in Seattle, Washington. [Vol. 11, 8:1-8.] She was offered "as an expert in *theology* to testify to procedures and practices in a church setting necessary to prevent reasonable foreseeable harm" [Vol. 11, 11:1-3 (emphasis added)], and she was accepted by the court as such.[4]

---

[4] Because of the implications of offering an "expert" in "theology," Ms. Seelen immediately added the disclaimer "I am not asking Reverend

Reverend Fortune testified to a "line" or "boundary" which may not be crossed in pastoral counseling, "an appropriate framework in which one functions pastorally and beyond which it becomes inappropriate. . . . " [Vol. 11, 17:9-15.] She was also allowed to give the jury her opinion that a "pastoral relationship" should be judged by the same standards as "in a therapeutic relationship, in the doctor/patient relationship, in the teacher/student relationship. . . . " [Vol. 11, 21:7-10.]

Reverend Fortune also stated expert opinions judging Mr. Wolfe's "qualifications for the job that he was asked to do." [Vol. 11, 29:13-14.] She said that, as she recalled, his only "qualifications had to do with the fact that he had been a preacher for a number of years and that he was a former director of education at the churches he served previously" and that, in her opinion, "neither of these things qualified him for the position that he was being asked to serve in." [Vol. 11, 29:14-20.]

Reverend Fortune gave standard of care opinions as to what is "inappropriate in the pastoral relationship." [Vol. 11, 33:22-23, 44:6-14.]

Similarly, Dr. Kathy Morall, who was offered and admitted to testify as an expert "in psychiatry qualified to give opinions on diagnosis, treatment, and prognosis," [Vol. 8,

---

Fortune to testify to religious beliefs or doctrine." [Vol. 11, 11:3-5.] On voir dire, Reverend Fortune acknowledged that her testimony would be based on her "own studies and records as far as what you devise for the procedures you believe should be followed," and that there are no standards she had discovered "within church bodies." [Vol. 11, 11:23-12:5.] Counsel for defendant Wolfe objected to her testimony "as an expert on what sounds as if it is to be directed toward a standard of care for a pastoral counselor, and we continue our objection on grounds that a civil court does not have jurisdiction to determine standards of care for church activities, and we think that this testimony would necessarily involve that subject. [Vol. 11, 12:19-13:1.] The court allowed her to testify as an expert on the basis that "she's got a level of education, training, and experience which would be of benefit to the jury in evaluating and determining the issues presented by this case." [Vol. 11, 13:2-7.]

52:1-4, 19-23], was allowed to testify, over objection, as to the "inappropriateness" of various pastoral counseling techniques Homer Wolfe "has on occasion used," based on her "professional experience." [Vol. 8, 74:24-75:25.]

Randy Sims was offered and accepted "as an expert in psychotherapy, qualified by reason of his education and expertise to render opinions on diagnosis, prognosis, and treatment." [Vol. 11, 67:2-5, 68:3-6.] He also was allowed to testify that Homer Wolfe violated the standard of care of "current law with psychological ethics, going back to the early '80's. . . . ." [Vol. 11, 72:3-4.]

Gary Schoener was offered "as an expert in psychology qualified to render opinions in psychology as well as responsibility of supervision in church setting and avoiding reasonable foreseeable injury." [Vol. 7, 46:11-14.] On voir dire, he stated that he "expect[ed] to give an opinion about how . . . Homer Wolfe should have conducted his pastoral counseling." [Vol. 7, 50:2-12.] He was accepted as an expert and allowed to give expert testimony in this area over objection. [Vol. 7, 50:14-21.] He went on to state an opinion (over objection) that Mr. Wolfe did not have the necessary qualifications to be administering the pastoral counseling he was providing, and that the Bear Valley Church of Christ should have been supervising him. [Vol. 7, 60:19-61:21.] He was asked to state an opinion "within a reasonable degree of psychological certainty, as to whether or not there was a breach of duty to the people he was counseling" and although he stated that he had "difficulty opining on that," he went on to voice an opinion that, under certain assumptions, "then it was a breach of duty, you know. . . . " [Vol. 15, 62:13-23.]

The Colorado Court of Appeals recognized the problem with this expert testimony in the *Bear Valley* case, and ruled that some of this expert testimony was improperly received. 890 P.2d at 224-228 (Appendix C, pp. 57-67). In reversing the Court of Appeals, the Colorado Supreme Court made a blanket statement that none of this testimony was improper (Appendix A, pp. 26-31), and similar testimony must be expected in other cases if these causes of action stand.

CONCLUSION

This case does warrant the attention of the Supreme Court of the United States. Battle lines have been sufficiently drawn between courts which give at least some meaning to the Religion Clauses in this context, and courts which have so eviscerated the religion clauses as to give them no meaning. In the first class are cases such as *Schmidt v. Bishop,* 779 F.Supp. 321 (S.D.N.Y. 1991); *Dausch v. Rykse,* 52 F.3d 1425 (7th Cir. 1994); *Barquin v. Roman Catholic Diocese, supra; Schieffer v. Catholic Archdiocese of Omaha, supra; Nally v. Grace Community Church of the Valley,* 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988); *H.R.B. v. J.L.G.,* 913 S.W.2d 92 (Mo.App. 1995); and *Amato v. Greenquist,* ___ N.E.2d ___ (Ill.App. 1997), 1997 WL 182763 (decided 4/16/97). (Even some of these cases allow "outrageous conduct" claims, but they have at least held the line on "breach of fiduciary duty.") The second class of cases is exemplified by the Colorado Supreme Court's decisions, although there are a growing number of other courts which are following Colorado's lead, such as *Erickson v. Christenson,* 99 Or.App. 104, 781 P.2d 383 (1989); *Jones v. Trane,* 153 Misc.2d 822, 591 N.Y.2d 927 (1992); *Sanders v. Baucum,* 929 F.Supp. 1028 (N.D.Tex. 1996); and *F.G. v. MacDonnell,* 291 N.J.Super. 262, 677 A.2d 258 (App.Div. 1996). The petitioner respectfully submits that the time has come for this court to take up this issue, to provide guidance not only to Colorado, but other jurisdictions around the country. This phenomenon will not go away, and there will be no better time to deal with it.

Respectfully submitted,

James D. Johnson
Counsel of Record
Hibschweiler & Johnson
Attorney at Law
2696 South Colorado Boulevard
Suite 595
Denver, Colorado 80222
(303) 692-0900